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Judge: Marc L. Barreca
Chapter 7
DATE: July 8, 2011
TIME: 9:30 a.m.
LOCATION: Seattle
RESPONSE DUE: July 1, 2011

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re: Adam R. Grossman, Debtor.	IN CHAPTER SEVEN PROCEEDING No. 10-19817-MLB MOTION BY COUNSEL FOR RELEASE OF FUNDS HELD IN IOLTA ACCOUNT

To: The Clerk of the U.S. Bankruptcy Court for the Western District of Washington,

To: The Region 18 United States Trustee

To: Ronald Brown, Chapter 7 Trustee, &

To: Adam R. Grossman, Debtor

COMES NOW Matthew D. O'Conner ("O'Conner"), attorney of record for Debtor in this Chapter 7 case, and respectfully moves this Court for an order permitting the withdrawal of $5,000.00 of the $11,500.00 currently held by Counsel in Counsel's IOLTA on behalf of the Debtor. This Motion is based on the fact that Debtor signed a mixed flat-fee/hourly fee agreement with Counsel prior to the filing of this chapter 11 petition. The flat-fee portion of the fee agreement was $5,000.00. A proposed order is attached.

I. Facts Supporting Withdrawal of the $5,000.00

On August 19, 2010, Debtor signed a fee agreement with Counsel that included the following language:

> **Initial Payment For Services**. This is a mixed flat-fee, hourly fee agreement.
>
> Client shall pay Counsel an initial payment of $5,000.00 for representation in the above matter and it is the Client's intention to have Counsel file an application to have the bankruptcy filing fee of $1,039.00 paid in installments. The $5,000.00 does not include any amount to be applied to the payment of the filing fee. Payment of the filing fee as required in any installment agreement order remains the responsibility of the Client. There is a minimum charge of $5,000.00 for any representation in this matter. Fees for services by Counsel and/or other charges in excess of the above amount shall be billed to Client at the rates indicated in the "Fees for Services" section. If any fees owing are not paid to Counsel (for any reason), Client is still liable for these payments. Counsel and staff will track their hourly work and once $5000.00 of work/expenses has been completed any service completed after this point will be billed to the Client. At this time an additional deposit of $4,000.00 is immediately required.

Note: the word "any" was underlined in the original fee agreement. (See Declaration of O'Conner filed herewith in support of this Motion).

On August 19, 2010, debtor filed this action as a chapter 11 proceeding.

On September 8, 2010, Debtor delivered a cashier's check to Counsel in the amount of $6,000.00. That amount was $1,000.00 in excess of the flat-fee portion of the

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fee agreement terms. Because of the excess $1,000.00, Counsel did not deposit the $6,000.00 cashier's check into Counsel's main account but rather kept the cashier's check in Counsel's office for a few months. (See Declaration of O'Conner).

On February 8, 2011, Counsel deposited the $6,000.00 into Counsel's IOLTA account. (See Declaration of O'Conner).

On February 11, 2011, Counsel deposited a second cashier's check that was delivered to Counsel by the Debtor into Counsel's IOLTA account on behalf of the Debtor. (See Declaration of O'Conner).

On March 11, 2011, the initial Chapter 11 proceeding was converted to Chapter 7.

On March 11, 2011, minutes after the conversion of the case from Chapter 11 to Chapter 7, O'Conner disclosed the existence of both of the cashier's checks directly to both the Chapter 7 Trustee and his counsel, Denise Moewes. (See Declaration of O'Conner).

On March 11, 2011, at that 'hallway meeting', the Trustee demanded that the funds (both checks) remain in Counsel's IOLTA account. (See Declaration of O'Conner).

On April 29, 2011, at Debtor's 2nd 341 hearing, Debtor stated via Counsel that the source of both of the above mentioned two cashier's checks were third parties and that those funds did not come from Debtor's estate. (See Declaration of O'Conner).

On May 4, 2011, Counsel filed a motion to withdraw as counsel for the Debtor.

On May 27, 2011, Counsel filed his Rule 2016(b) Disclosure of Compensation.

On May 27, 2011, at the hearing on Counsel's motion to withdraw, Debtor once again stated via his Counsel that the source of the two cashier's checks were third parties and that the funds were not from Debtor's estate. (See Declaration of O'Conner).

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On May 27, 2011, at an oral hearing, this court granted Counsel's motion to withdraw.

As of the date of this motion, the funds still reside in Counsel's IOLTA account. (See Declaration of O'Conner).

The legal fees for Counsel's work on Debtor's chapter 11 petition are $31,658.50; far in excess of the $5,000.00 being sought in this motion. (See Declaration of O'Conner).

II. Earned On Receipt Funds May Be Directly Deposited Into Counsel's Main Account.

Section 541(a)(1) provides:

> The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> 11 U.S.C. § 541(a)(1).

Further, "funds paid to an attorney by a client for services "become property of the estate only if, under applicable state law, the debtor has an interest in the [funds] at the time of filing the bankruptcy case." In re GOCO Realty Fund I, 151 B.R. 241, 250 (Bankr.N.D.Cal. 1993) (emphasis added).

Under In re Bigelow, 271 B.R. 178, 187-188, 38 Bankr.Ct.Dec. 220, 01 Cal. Daily Op.

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Serv. 10,558, 2002 Daily Journal D.A.R. 17, 9th Cir.BAP (Wash.), 2001,

> "Washington law authorizes nonrefundable prepaid fees, provided that the client agrees to the arrangement. Wash. State Bar Ass'n, supra (citing with approval the distinction between "retainers" and "advance fee deposits" set forth in Baranowski, supra); See also Anne I. Seidel, Nonrefundable Retainers and Advanced-fee Deposits, WASH. STATE BAR NEWSS (September 1996). "Any fee paid to a lawyer that the client has agreed is not refundable and is earned upon receipt for handling the client's case shall not be deposited in the lawyer's trust account." Wash. State Bar Ass'n, supra (emphasis supplied).FN11"

Unfortunately, the Washington State Bar Association (WSBA) Ethics Opinion being referred to in the above quote is WSBA Ethics Opinion 186 (1990) which was withdrawn by the WSBA Board of Governors on December 9, 2005.

"A "classic" retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time and is considered earned by the attorney upon receipt whether or not services are actually provided. Baranowski v. State Bar, 24 Cal.3d 153, 164 n. 4 (1979); SEC v. Interlink Data Network, 77 F.3d 1201, 1205 (9th Cir.1996); In re Bigelow, 271 B.R. at 187. As these funds are the attorney's funds, and because a client has no interest in such funds, the bankruptcy estate has no interest in a "classic" retainer upon the filing of bankruptcy. In re McDonald, 114 B.R. 989, 999 (Bankr.N.D.Ill. 1990); In re C & P Auto Transport, Inc., 94 B.R. 682, 687 (Bankr.E.D.Cal. 1988).

The distinction between classic and advance fee retainer agreements is important because if a retainer is not an asset of the estate, then it is not subject to the fee application proceedings found in 11 U.S.C. § 330 and § 331, and Bankruptcy Rules 2016(a) and 2002(a)(7). In re James Contracting Group, Inc., 120 B.R. 868, 871,

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Bkrtcy.N.D.Ohio,1990 citing In re McDonald Bros. Const., Inc., 114 B.R. 989 (Bankr.N.D.Ill. 1990).

Counsel believes that $5,000.00 of the $6,000.00 cashier's check is a "classic" retainer and as such moves the court for an order authorizing the transfer of $5,000.00 of the IOLTA funds to Counsel's main account.

Counsel draws the court's attention to the sentence in the fee agreement that reads: "There is a minimum charge of $5,000.00 for any representation in this matter." Debtor completed a master's degree in business from the University of Pennsylvania in 2005. Debtor knew what he was signing and that $5,000.00 of whatever funds were received by Counsel would be earned upon receipt or a 'classic retainer.'

Counsel concedes, as it must, that the $6,000.00 cashier's check was paid to Counsel post-petition. However, as Debtor has stated several times that the funds came as a gift from a third party, those funds did not become part of Debtor's estate. As stated above in McDonald and C & P Auto Transport, Inc., funds that are not assets of the estate are not subject to the fee application proceedings found in 11 U.S.C. § 330 and § 331, and Bankruptcy Rules 2016(a) and 2002(a)(7).

Accordingly, as the fee agreement signed by the Debtor clearly spells out that the fee agreement was a "a mixed flat-fee, hourly fee agreement" and that $5,000.00 of the funds received by Counsel were due for "any" representation, the $5,000.00 should be viewed as earned upon receipt and Counsel should be allowed to transfer $5,000.00 to Counsel's main account.

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III. This Request Is Timely.

Failure to request appointment or fees in a bankruptcy matter that is subsequently dismissed does not necessarily bar the attorney from later seeking fees in a separate proceeding. See In re Elias, 215 B.R. 600, 603-04 (9th Cir.BAP, Nev., 1997), aff'd, 188 F.3d 1160 (9th Cir.1999).

In this instance, while the Court has already granted Counsel's motion to withdraw as counsel for Debtor at an oral hearing on May 27, 2010, Counsel now seeks court approval of the flat fee section of it's fee agreement with the Debtor.

Accordingly, and for the above reasons, the court should allow Counsel to transfer $5,000.00 of the fund's held in Counsel's IOLTA account for Debtor to Counsel's main account.

DATED this 3rd day of June, 2011.

/s/ Matthew D. O'Conner

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Copies to:

Region 18 United States Trustee (electronic notice)

Ronald Brown, Chapter 7 Trustee (electronic notice)

All other parties listed on Debtor's Master Mailing List as of June 3, 2011

Adam R. Grossman, Debtor

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In re: Adam R. Grossman, Debtor.	IN CHAPTER SEVEN PROCEEDING No. 10-19817-MLB ORDER GRANTING COUNSEL'S MOTION FOR RELEASE OF FUNDS HELD IN IOLTA ACCOUNT

THIS MATTER having come before the Court on the Motion of Matthew D. O'Conner for an Order Permitting Release of $5,000.00 of the Funds Held by Counsel on behalf of the Debtor's in Counsel's IOLTA Account, the Court having reviewed the files and pleadings herein and having heard any argument of counsel, and otherwise being fully advised in the premises, now, therefore,

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IT IS HEREBY ORDERED that Matthew D. O'Conner is hereby permitted to transfer $5,000 of the funds held in Counsel's IOLTA account on behalf of the Debtor to Counsel's main account.

DATED this _______ day of July, 2011.

____
MARC L. BARRECA
U.S. Bankruptcy Judge

Presented By:

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By: /s/ Matthew D. O'Conner_______
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